

National Human Rights Consultation Submission

AGWW-7Q4SY4

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Submission Text:

Mr Chairman, I use this otherwise ego inflating letterhead as a number of the matters I raise are more properly for the attention of the Attorney and its presence might at least see the relevant parts read by one of his clerks when I copy it to him.

Despite the fact that I have come to the conclusion that, in all likelihood, I am wasting my time (and that of the Committee) in preparing this submission, I suppose in retirement one has little else to do but to waste time.

The cause of my reluctance to be involved starts with the terms of reference and goes on to the composition of the Committee itself, matters of course beyond the Committee's control.

Then, lastly, there is the methodology adopted by the Committee which is within its brief to control.

The terms of reference, in my reading of them, all but exclude meaningful discussion other than toward identification and enhancement of new and existing human rights.

The clumsily drafted second dot point is utterly swamped by the rest of the document and in any event only relates to the first dot point. Couple this with the Attorney's statement (on television) when announcing the enquiry "...Australia is the only democratic country in the world without a Bill of Rights to protect human rights..." , one is left with the inescapable conclusion, as the Attorney sees it, that the people cannot be guaranteed such rights without a document to say we have them.

Therefore, ipso facto, have one we shall.

My other concern as to whether or not there is any point in my raising a (lonely?) cautionary voice is the Attorney's choice of committee members.

No one can doubt the eminence of each of them in their own fields and that they are quite outstanding Australians is certain, but three of the four are self avowed advocates for the very thing they are supposedly called upon to (impartially) enquire into and report upon.

Only Mick Palmer, known personally to me for many years, comes without apparent "baggage" and he would well know that the types of "rights" under discussion here can be of but little impediment to the application of the criminal law as it is practiced or to the policing of same.

And my last disincentive to joining in this exercise with enthusiasm is the "gaggle" method chosen to gather oral contributions during the Committee's travels.

It seems to me that the whole structure is designed purely to allow people to pop up and offer a few pet ideas, but allow absolutely no vehicle for analysis of the implications flowing from those ideas - it takes three seconds to say "Every child should have guaranteed the right to an education", but it takes ten minutes at least to offer an even cursory analysis as to just what would be the practical implications of such a provision to the delivery of education and what indeed would it mean to court lists if it were justiciable - a subject to which I will return later in the broader context.

In my submission, such are the risks inherent in formalising, in a dedicated and enforceable code, a statement of civil and political rights, that we should only do so where there is overwhelming evidence that tangible public benefit will flow from such codification.

The only test of this, surely, is that civil, political and human rights in this country are being trammelled and that there is no avenue in law to remedy these abuses.

We should not venture on this course because it is seen as “fashionable” or so our UN ambassador (or Prime Minister) can trumpet our virtues at some meaningless conference in some bastion of liberty like Serbia, or so the Attorney does not have to again admit that we are “the only democracy in the world without (one)” (It is beyond belief that we are here talking about civil rights at the behest of a government which simultaneously wants to impose outrageous internet censorship, a la an Iran or North Korea or even a Burma, such that an adult cannot view material which the government considers unfit for children! It really does make this Committee’s work farcical).

Where is, I ask, the evidence that the having in rigid code form an all embracing guarantee of rights will deliver to the people greater freedom (whatever that might mean) over those who do not have such a lumpen package of verbiage.

We do not have such a blessing yet, so are we as a result the worse for it - are we inferior to Mr Putin’s Russia which has one firmly entrenched in its very constitution, but in which country, for example, one can only stand for public office if the Prime Minister finds the candidate acceptable.

The Democratic Republic of Germany had one, The Democratic Republic of the Congo has one and Zimbabwe has one, and at the time of the “Generals”, Argentina had one.

Where is the evidence that the people of these countries are, or were, at an advantage over us.

And, of course the United States, it would tell us, leads the world in the guarantee of ‘life liberty and happiness’, but does Australia really want to be like the United States of America where ‘freedom’ to the extent of anarchy can near bankrupt the planet?

And how much better is the lot of the peoples of greater Europe than we with all their complicated guarantees and their vastly expensive court systems set up to enforce these myriad guarantees.

What have the people of Spain and Germany and France and Ireland and Albania and 19 other nations including Russia gained over us in the last 48 years since the first of their specialist human rights courts were set up.

What has been the cost benefit, if any benefit at all, to all those nations, or rather their peoples, since 1960 when the European Court of Human Rights was first established and which in that year heard its just one case but in 2001 heard 887, the next year over 1000 and in 2006 dealt with 1,556 cases in that one year alone and is now employing forty five judges at an annual cost of about \$A150 million and this only for its internal operational expenses!

Do the people of these nations, as a result of the 96,793 cases filed (as opposed to the 9773 proceeding to “judgement”) in that court, enjoy human rights greater than we who do not have such a court at all?

And are they, the people of these countries of Europe any better served than we as a result of the 1051 gatherings, at heaven knows what cost, of the “Committee of Ministers for Human Rights” which no doubt their taxpayers are pleased to learn will now only be meeting six times a year

instead of eight?

But wait, there's more; I forgot about the meetings of the Ministers for Human Rights Deputies which meets four times a year as well!

And these figures are only of ONE European court solely dedicated to "human rights" pleadings. The European Union has over the top of this court, the Grand Chamber, recently set up, which has heard another 211 cases of inter member human rights disputes. (European Court of Human Rights and EHRC data)

And then there is England/Wales and Scotland, the latter alone having heard in its Supreme Court, 702 human rights matters while the various superior courts of England and Wales have handed down a mere 12,386 judgments - none of which are binding on anyone, all being declaratory opinions only. (BAILII data)

So rewarding is the human rights industry, a whole new legal specialty has sprung up in the UK (viz the wife of the immediate past prime minister) the taxpayer being almost exclusively the source of this nice little earner along with picking up the bill for every other facet of this deluge of litigation.

What an appalling waste of public resources producing no real benefit to anyone save granting a warm glow to some otherwise unimportant ministers as they sip on cups of tea on the West Bank of the East River in New York, or, on visits home, Lake Geneva .

I ask, seriously, how does all of this make the people of those lands better protected against human rights violations than we are in Australia right now.

And let us not be so foolish as to say that this insanity will not apply to us. If we give the means to the motivated to turn our courts into production lines for largely disruptive litigation, then so it will be.

As has happened in Europe, England/Wales and Scotland, (I have not mentioned the US case load as I cannot count that high) well nigh every grievance conceivable will be able to be taken to court on the grounds that it breaches some article or other. (Go to BAILII and see how many cases involved a child (read social engineer) taking mum and dad to court for a vile breach of the "Rights of the Child" convention i.e. failing to spoil the brat!!)

Mr Chairman, we live in a nation served by, arguably, the finest legal systems in the world (even allowing for the exponential growth of judicial lawmaking which blight is hardly unique to Australia) and, indisputably, a peerless liberal/democratic system of government.

We can leave it that way and legislate as needed in the ordinary way, or we can "improve" it by being another United States, or England or perhaps a Greece or a mirror of a Slovakia or better still, Russia, which basks in the guarantees obtained from Chapter 2 of its Constitution containing no less than forty one (41) high minded placita which most ordinary Russians would not know even existed and, if they did, would know they had no application to them whatsoever.

I note that the terms of reference place a caveat on the Committee that any Code is not to be included in the Constitution and also contains the highly fanciful notion that "the sovereignty" of parliament should be preserved.

With the greatest of respect to the Attorney, for a lawyer and politician the naivety shown by this addition is astonishing.

There is no such thing as an Australian law made by any parliament which is immune from judicial modification or philosophical massaging or, to use the words of Mason J, "to fill the gaps of any inadequacies of the statute..."

or per Kirby J “The function of this (High) Court in constitutional (small “c”) adjudication, is to give proper meaning to public values” (This in fact is a quote lifted and then modified for the occasion from the “Harvard Law Review” and now, courtesy of the former judge, Australian judicial doctrine, it seems.)

The simple fact is, there is no such thing as “parliamentary sovereignty” assuming the intention of that statement is to frame any “Bill of Rights” such as to prevent the courts from exercising a review function of it, or as then Kirby J said, (*supra*) to give the proper meaning to public values as the courts imagine them to be and this from a body of people as far removed from what the public values as can be without them taking up residence on the dark side of the Moon. (I once knew a supreme court judge who demanded that the equivalent of the Hanging Gardens of Babylon be installed on a supreme court roof so that “I need not meet with (common) people in the street when I want to go for a (restorative) walk!”)

Even more perplexing is the Attorney’s direction that his Bill not be enshrined in the Constitution, the only possible way of achieving, at least partially, his sought after immunity from judicial reconstruction of his intent.

My best wishes go to any parliamentary counsel asked to draft this lot as he would be well aware that the courts will defend their self granted function as the land’s ultimate legislatures regardless of wishful thinking by politicians.

No better example can be found of the demise of the once basic rule that legal construction is “primarily a text based activity” than the then American Administration’s attempt to set up military commissions to try terror suspects.

That law, duly passing the Congress of the United States, specifically excluded the civil courts from any involvement whatsoever.

And the courts, of course, took no notice of Congress whatsoever.

The enactment, both as to its validity and operation, were tested in just about every federal court the protagonists thought could claim a passing interest in it until five years later, without the commission ever once sitting, the Supreme Court struck the whole thing down anyway, not on what was written in the legislation or even the United States Constitution, but what the judges thought the framers of the Constitution, born over two hundred years before international terrorism was even in the language, “might” have “contemplated” in designing it.

So much for giving “proper meaning to public values”.

What has gone before in this submission may seem more of a rant against the courts than a submission on the assigned subject.

It is not intended to be so for I have already said that we have, in my view, as good or better system of justice than anywhere else which comes readily to mind.

But the fact remains, the courts are what they are and the inevitable result of embarking upon a course of action leading to a dedicated “Bill of Rights,” no matter how cast, will see a massive increase in litigation much of it like the avalanche of cases filed in the Federal Court in the middle years of the Howard government aimed as much as anything else in utterly crippling our control over blatantly illegal “immigrant” entry into this country; a cause launched behind a smoke screen of “human rights” and towards judges with a shared sense of “public values”.

Those with “causes” will be “enabled” and will use the new Code as a platform for political and ideological protest, just as has happened in the vast majority of European cases as evidenced by the tiny fraction of those

which achieved anything more than to provide a lofty and expensive soap box for the radical and disenchanting.

And as in those countries the annual cost will be in tens of millions of dollars and years of injunction induced administrative paralysis.

But notwithstanding, if oppression of the people's rights in this country were indeed rampant, or even significant, I would be prepared to support these costs if I really believed that the people (as opposed to the lawyers and graduates of trendy universities) would be appreciably better off as a result of such a code.

But Australia is not so blighted - on the contrary it is an example of a demonstrably fair and balanced liberal democracy which at the same time still has some capacity left to deal with such things as terrorist threats and the smuggling of enterprising human beings by organised criminals for nothing other than personal gain to both.

It is, to me, one of the greatest of latter day insults to the majority of any nation's citizens that an international convention designed to protect the genuinely oppressed could be used by lawyers, of their own motion, to help this vile trade prosper because of an apparent inability to see beyond some trendy notion drilled into them at university where "lefty" rot is fashionable and where the measure of one's "professionalism" is measured by instances of passionate resistance to "The State".

These same will be the custodians of our nice new Code.

The true custodians of "public values", however, must be the public themselves and through them their representatives in the parliament where any emerging need for civil rights protection can be addressed in the proper order, just as it has been in the many well considered laws already available.

There is not one single, sensible suggestion yet put forward to your enquiry Mr Chairman, at least of which I have heard or read, that is not already protected by ordinary domestic law and that has not been settled as to effect in the courts or cannot so be by expedient and existing means.

We have dedicated commissions with the power to impose sanctions in each of the States and Territories and a Federal Court having like jurisdiction for the Commonwealth and surely, in the name of sanity, that should suffice.

Earlier, I questioned within parentheses what "freedom" might mean in the context of human rights and it is a subject which deserves some analysis.

The fact is, using an Oxford definition, it does not exist in reality.

Let us take a more common demand of "freedom" and a pet demand of the media, "freedom of expression" which includes both speech and press.

This country already cherishes the notion, a notion supported by the High Court to the extent that adding to it the status of a formal human right will not add to its sanctity.

Yet the right to freedom of expression is so subject to other constraints as to no longer deserve the term, a freedom.

Our right to freely express ourselves is subject to the laws and rules governing defamation (weak as they are), national security, trade, copyright, privacy, child protection and racial vilification to name a few.

In Europe one is thrown into jail for holocaust denial and Australia will refuse anyone espousing it an entry visa.

In Thailand, one gets porridge for making naughty comments about the royal

family.

If I were to avail myself of time travel and go to Munich in 1939 and publicly state my political philosophy, I would be imprisoned.

If Dr Goebbels were to come to Australia in 2009 and espouse his, he would likewise be imprisoned.

The extent to which freedom of expression prevails depends upon the time and place in which it is exercised and beyond that it is a myth.

Therefore, this freedom, as with all of the others we can put into our Bill of Rights, reflects no more nor less than the moment and place in which we live and will be governed by the restrictive rules of that time and place.

There is therefore, and not just in the matter of freedom of expression, a very real risk of obsolescence in seeking to impose our standards by way of some immutable code of behaviour on generations to come.

It is certainly arrogant.

But if the intention is that our nice new code is only temporary, what are we going through all this process for when temporary laws are best left to contemporary parliaments.

And I cannot let this subject go without a special mention of the media which is at the forefront in demanding special rights within it - well nigh every speech the Editor In Chief of our tabloid by size and tabloid by nature, the "Brisbane Courier Mail" utters is a hand wringing plea for "freedom of the press" to be enshrined in the Constitution somewhere above the Queen invoking the grace of God.

If ever there is a case of no care and no responsibility it is the media in its endless search for a story, or rather some snippet of rot designed to entice readers to buy their rags and advertisers to buy space which would otherwise be filled with rot.

If ever an entity existed which collectively is utterly devoid of the faintest concept of ethics and basic fairness it is our newspapers.

How many times do we see some hapless citizen utterly pulped by the media on page one only to see a retraction days later hidden in a one by two buried amongst the "girly" ads or if the aggrieved is as impecunious as most of us are, they get a letter from a QC, through a Pitt Street solicitor piously "standing by the story", saying that any action taken against the publisher will be vigorously defended (the rich "vigorously" defend, the rest hope their lawyer can speak and write reasonable English).

The reality of course, is that the victim very rarely has the resources to even think of litigation against the vast power and wealth of the media giants.

The Committee would be aware that for years now the media has been lobbying for drastic changes to the laws of defamation and have so persuaded the common law makers, the courts, of the "public's right to know" such that the law of defamation has now been effectively reduced to the need for the defamed almost having to show malice - the fact that the article was totally wrong and harmful no longer is sufficient such is the raft of defences now in place.

Now, I ask the Committee to envisage a press empowered, as they are demanding, with a clause in a Bill of Rights drafted to the satisfaction of the editors in chief of this nation's media outlets.

Lastly, in turning back to the Terms of Reference, is there, at least to my way of seeing things, a manner in which human rights in Australia can be better served.

Perhaps so.

The Committee could well give thoughtful attention to the fact that we have many differently sourced laws protecting human and political rights in this country and indeed a confusing array of tribunals claiming jurisdiction over them, a result in part of the lack of power now held by the Commonwealth to establish "non court" commissions with the power to hand down enforceable judgments. (We in fact once had Commonwealth commissions so empowered until the High Court preserved judicial monopoly by declaring them unconstitutional)

I hasten to add that I do not advocate the establishment of such a dedicated court for the very reasons I have alluded to above - we just do not need to create a vastly expensive body which, as overseas experience should tell us, is by and large nothing more than a stage upon which vexatious and politically motivated utopians can raise theatrical cries of righteous outrage.

But maybe we and the cause of human rights might be better served either by a single Federal Act, which clearly the Commonwealth has the constitutional power to pass, or at least an "immutable" set of laws agreed between the States and underpinned by Commonwealth law - this is needed because of the experience with such failures as the "unified" Firearms Acts when such attempts are left to the States alone - even the short titles of the various enactments are not the same any more.

This, hopefully, would also see a commonality between the various tribunals and a simplification of the relevant laws generally.

Be all of this as it may, might I make a specific request, and that is for the Committee to ask the Attorney to at least lift the clear bias in the terms of reference and, with the greatest of respect to the existing coram, to assist the Committee by giving it an additional member who, by background and word, would not have already nailed the flag to the mast.

Jim Robertson
March 14, 2009
Copy, Attorney General's Office.

The writer is a former Attorney General himself and has served on numerous enquiries and presided over an adversarial tribunal for more than seven years.

His special interest has been constitutional development in the Northern Territory and nationally, and he has been a consultant to two Chief Ministers on statehood and two Prime Ministers on federation, was a member of the Constitution Centenary Foundation, attending all capital city conventions and was an accredited advisor to the Northern Territory delegation at the Constitutional Convention in Canberra - amongst other deeds of folly.

